Nos. 91-790 and 91-1206

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

CSX Transportation, Inc.,
Petitioner,

v.

Lizzie Beatrice Easterwood,
Respondent.

Lizzie Beatrice Easterwood,
Cross-Petitioner,

v.

CSX Transportation, Inc.,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

AMICI CURIAE BRIEF OF THE STATES OF OHIO, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, IOWA, MASSACHUSETTS, MINNESOTA, MONTANA, NEVADA, NEW MEXICO, PENNSYLVANIA, TEXAS AND WYOMING IN SUPPORT OF RESPONDENT AND CROSS-RESPONDENT LIZZIE BEATRICE EASTERWOOD

LEE FISHER
Attorney General of Ohio

NANCY J. MILLER *
Deputy Chief Counsel
Ohio Attorney General's Office
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5026

* **Counsel of Record**

[additional counsel listed on inside cover]

WINSTON BRYANT
Attorney General
State of Arkansas
323 Center Street, Suite 200
Little Rock, Arkansas 72201

RICHARD BLUMENTHAL
Attorney General
State of Connecticut
Office of the Attorney General
55 Elm Street
Hartford, Connecticut 06106

CHARLES M. OBERLY III
Attorney General
State of Delaware
Office of the Attorney General
820 North French Street, 8th Floor
Wilmington, Delaware 19801

ROBERT A. BUTTERWORTH
Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399-1050

RONALD W. BURRIS
Attorney General
State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

BONNIE J. CAMPBELL
Attorney General
State of Iowa
Office of the Attorney General
Hoover State Office Building
Second Floor
Des Moines, Iowa 50319

SCOTT HARSHBARGER
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts 02408-4698

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota
Office of the Attorney General
102 State Capitol
St. Paul, Minnesota 55155

MARC RACICOOT
Attorney General
State of Montana
Office of the Attorney General
Justice Building
215 North Sanders
Helena, Montana 59620-1430

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710

TOM UDALL
Attorney General
State of New Mexico
Office of the Attorney General
Bataan Memorial Building
Santa Fe, New Mexico 87504-1508

ERNEST D. PREATE JR.
Attorney General
Commonwealth of Pennsylvania
Office of the Attorney General
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120

DAN MORALES
Attorney General
State of Texas
Office of the Attorney General
Capitol Station
P.O. Box 12548
Austin, Texas 78711-2548

JOSEPH B. MEYER
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

TABLE OF CONTENTS

Statutes:

Other Authorities:

STATEMENT OF INTEREST

Tort liability and remedies create dynamic incentives for responsible industry conduct to prevent future harm and promote the public health and safety. States have a vital interest in preserving their inherent police power to compensate victims of tortious conduct, especially where, as here, no comparable federal remedy is available.

Unquestionably, the amici states have a substantial interest in minimizing deaths and injuries from accidents at unsafe public grade crossings. As a single example, the State of Ohio experiences rail traffic from four major rail carriers, high-speed AMTRAK passenger trains, and a host of regional and short-line railroads that operate over more than 6,000 miles of trackage across the state. With approximately 6,500 public grade crossings, Ohio ranked second only to the state of Texas in injuries and fatalities resulting from grade crossing accidents in 1991. During that timeframe, Ohio experienced a total of 316 grade crossing accidents, resulting in 56 fatalities and 121 injuries. Thousands of public grade crossings in the amici states are only passively protected with crossbuck signage that provides no warning to motorists of approaching trains.

The Court must continue to recognize the important supplementary role occupied by state courts in promoting public safety in the face of widespread railroad operations throughout the amici states. Reversal of the decision below will drastically limit availability of tort remedies, and greatly impair important state functions advanced by state common law. The Court should be highly circumspect of railroad industry attempts to achieve such a significant erosion of authority traditionally reserved to the states.

Accordingly, amici submit this brief, pursuant to Supreme Court Rule 37.5, to assist the Court in the resolution of this case, and to urge the Court to hold that federal statutes and regulations do not preempt common law tort actions against railroads.

SUMMARY OF ARGUMENT

The court below correctly held that federal law, principally the Federal Railroad Safety Act (FRSA), and related regulations, do not preempt Respondent's tort action against CSX Transportation, Inc. (CSX or Railroad) for failure to provide adequate warning devices at a public grade crossing controlled by CSX.[1] With enactment of the FRSA, Congress established that state regulations relating to railroad safety shall continue in force until the Secretary of Transportation promulgates regulations covering the subject matter of the state requirement. 45 U.S.C. §434. The issue before the Court is whether the Secretary has issued regulations addressing a railroad's duty of care under state law to provide adequate warning devices at public grade crossings.

The regulatory and compensatory aspects of the common law represent a critical exercise of the inherent police powers reserved to the several states. Sensitive to concerns of federalism, Congress has recognized the sound public policy of preserving from preemption the public's right to pursue such actions, as embodied in the plain language of 23 U.S.C. §409. That statute unequivocally contemplates tort actions for damages against railroads arising from vehicle-train collisions at public grade crossings, and provides an independent basis upon which to affirm the decision below.

The Railroad's attempts to advance broad preemption of common law actions finds no better support under the FRSA, the Federal Highway Safety Act (FHSA), or current federal regulations addressing railroad safety matters. Existing federal regulations create federally-funded programs and establish

---

1 Respondent Easterwood raised several claims for negligence against CSX below. This brief addresses only Respondent's claim against the Railroad for failure to provide adequate warning devices at the Cook Street grade crossing where Respondent's husband was struck and killed.

standards for design, engineering, and placement of safety warning equipment at grade crossings where federal funds are utilized for such improvements. The *duty* to install such devices, the focus of a tort action, requires a fact-sensitive determination based upon specific circumstances at a specific location, and therefore embodies an analysis not readily susceptible to "coverage" by uniform federal regulation.

Continued access to state courts does not conflict with or obstruct any overriding federal congressional purpose. The stated purpose of the FRSA is to improve safety in all areas of railroad operations and to reduce injuries and deaths. 45 U.S.C. §421. State tort actions work largely to achieve the same ends. An award of tort damages fairly compensates victims of tortious conduct and creates strong incentives for railroads to seriously undertake their well-established common law responsibility to provide safe grade crossings for public usage.

The Court should be reluctant to adopt the untenable result sought by CSX that would require state courts to abdicate their long-established role in promoting safer grade crossings. Under the guise of preemption, CSX seeks to convert federal statutes and regulations, intended to promote safety, into a shield to insulate it from liability for foreseeable harm at public grade crossings under its direct supervision and control. Congress could not possibly have intended such an absurd result.

ARGUMENT

I By enacting 23 U.S.C. §409, Congress has sought to recognize important state functions by preserving common law tort claims against railroads for injuries and deaths attributable to collisions at public grade crossings.

The right of an aggrieved party to seek compensation for another's negligence is fundamental to our system of justice. Deeply embedded in the fabric of state sovereignty, the ability of state courts to determine liability and award damages represents an important exercise of a state's primary and historic police powers to promote the health and safety of its citizens. The development of a consistent body of tort common law is central to the ability of states to shape and influence desirable behavior. With thousands of public grade crossings across the country only passively protected by standard crossbuck signage, tort claims complement the efforts of state regulators who are required to tackle this widespread safety problem with limited administrative and financial resources. Congress has expressly recognized this important state function with the enactment of 23 U.S.C. §409:

> *Notwithstanding any other provisions of law*, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes *in any action for damages arising from any*

> *occurrence at a location* mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Emphasis added).

The Court need not look beyond the express words of 23 U.S.C. §409 to conclude that the Railroad's preemption arguments are without merit. Enacted in 1987, that statute limits the admissibility or other use of information that is collected and used as part of state-administered federally-funded safety programs for railroad grade crossings. The purpose of this statute is to encourage a free flow of information among railroads, local governmental authorities, and state regulators charged with administering these funded safety programs. This goal is furthered, according to the plain statutory language, by limiting the use of such information in *any action for damages arising from any occurrence* at any crossing referenced in the information. Clearly, Congress contemplated the continued right of the public to bring negligence claims against railroads arising from grade crossing collisions, as evidenced by these plain words. Just as clear is the congressional determination that the provisions of Section 409 are intended to control over "any other provisions of law."

In 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991, amending Section 409 to preclude the *discovery* of such information. 23 U.S.C. §409 (as amended Pub. L. 102-240, Title I, §1035(a), Dec. 18, 1991, 105 Stat. 1978). However, the "in any action for damages" language remained *intact and unchanged* from the 1987 enactment. Once again, Congress had the opportunity and declined to expressly preempt or preclude state tort actions predicated upon a railroad's duty to provide safe grade crossings. Had Congress done so, the discovery and admissibility preclusions set forth in 23 U.S.C. §409 would be redundant and simply unnecessary. A fundamental principle of statutory construction is that "Congress cannot be supposed to

have intended a vain thing." *Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U.S. 634, 639 (1877); accord *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-626 (1978) (holding that when Congress speaks "directly to a question, the Court is not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.")

Congress is further presumed to be knowledgeable about existing law pertinent to the legislation that it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988), *citing Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 319-320 (1983). Congress must therefore be presumed to have been aware of state tort suits against railroads for injuries and deaths resulting from grade crossing collisions, both when it enacted 23 U.S.C. §409 in 1987, and more recently when it amended that statute. Nevertheless, Congress has refused to alter or amend the language of that statute to preclude "actions for damages arising from occurrences" at railroad grade crossings. Had Congress determined that a proliferation of state tort suits was inconsistent with or "disruptive" to the federal regulatory scheme, as CSX argues, it could easily have expressed its preemptive intentions. Instead, Congress has knowingly declined to express any such intention.

Indeed, Congress has demonstrated its ability to use very explicit language to express its intent to preempt or not to preempt state common law. See, e.g., 12 U.S.C. §§1715z-17(d) and 1715z-18(e) (certain insured mortgages not subject to specified common law limitations); 17 U.S.C. §301(c) (no preemption of common law with respect to sound recording copyrights for specified time); 29 U.S.C. §653(b)(4) (workman's compensation common law not preempted); 29 U.S.C.§1144(a), (c)(1) (preempting common law regarding employee benefit plans). Congress' careful selection of the words "in any action for damages" in 23 U.S.C. §409 expresses a clear intention that state tort actions, arising from grade crossing collisions, are not to be preempted by federal statutes or regulations that address railroad safety

matters. To hold otherwise would ignore the clear and unambiguous language of the federal statute, and effectively render the statutory text meaningless and unnecessary.

The Court should be reluctant to disturb the central function of state court systems in shaping and promoting responsible industry conduct, particularly where, as here, the scope of the safety problem is pervasive and public lives are daily at stake. The congressional intent espoused in 23 U.S.C. §409 is unambiguous and unmistakable. Congress has mandated that important state policies, furthered by the regulatory and compensatory functions of state tort actions, are to be preserved from federal preemption. The Court should refuse to expand federal power in a way that unnecessarily encroaches upon vital state interests, and is contrary to the express language of 23 U.S.C. §409.

II. Federal statutes and regulations that address railroad safety do not constitute a clear and manifest congressional intent to preempt state tort actions against railroads for failure to provide safe public grade crossings.

Preemption is fundamentally a question of congressional intent. *English v. General Elec. Co.*, ___ U.S. ___, ___, 110 S. Ct. 2270, 2275 (1990); *Schneidwind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988). In analyzing preemption questions, the exercise of federal supremacy is not to be lightly presumed. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 139 (1973). The Court's preemption analysis must be guided by an abiding respect for the delicate federal-state balance of power preserved in our federalist system. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) (citations omitted); see also, *California v. Federal Energy Regulatory Commission*, ___ U.S. ___, ___, 110 S. Ct. 2024, 2029 (1990) (citations omitted). Congress may preempt through use of express statutory language, or impliedly by pervasively occupying a regulatory area to the exclusion of state

regulation. Preemption of state law has also been found where state law conflicts with federal law such that compliance with both cannot be achieved, or where state law stands as an obstacle to accomplishment of Congress' purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The Court has previously recognized that traditional principles of state tort law apply with full force absent a clear and manifest congressional intent that such principles be supplanted. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-186 (1988) (affirming Ohio Supreme Court decision upholding increased workers' compensation award for injuries arising from a safety violation at federal government facility in the face of a preemption challenge under the federal Atomic Energy Act); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Where, as here, the field that Congress is said to have preempted includes areas traditionally regulated by the states, congressional intent to supersede state laws must be clear and manifest. *English*, ___ U.S. ___, ___, 110 S. Ct. 2270, 2275. The presumption against federal preemption is especially strong where safety is involved and the state's residents would otherwise be left unprotected while they await federal action. *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940); *Kelly v. Washington*, 302 U.S. 1, 10-14 (1937). The Court has noted the particular vitality of this presumption where preemption of state remedies is sought and Congress has failed to provide any specific federal remedy or recourse for those injured by wrongful misconduct. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

Federal legislation has traditionally established a *floor* of safe conduct and, before transforming such legislation into a *ceiling* on states' authority to protect their citizens, courts should discern a clear statement of congressional intent to supplant state law. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1548 (C.A. D.C. 1984), *cert. denied*, 469 U.S. 1062 (1984), *citing United States v. Bass*, 404 U.S. 336, 349-350 (1971); see also, *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290,

302-304 (1976). To overcome the strong presumption against preemption required to prevail in this case, CSX must establish a clear and manifest congressional intention to preempt state common law tort actions. *Metropolitan Life Insur. Co. v. Massachusetts*, 471 U.S. 724, 748-752 (1985).

The amici submit that the text and legislative history of the federal statutes relied upon by the Railroad, particularly when construed in light of the express language of 23 U.S.C. §409, are wholly inadequate to demonstrate the requisite clear and manifest congressional intent to preempt common law tort actions against railroads for failure to provide safe grade crossings. The Railroad's arguments misapply the intended scope of the FRSA, the Federal Highway Safety Act (FHSA), and related federal regulations, in an overly broad fashion that lacks support either in the statutory language or the legislative history. The issue of a railroad's duty to provide a safe grade crossing involves a uniquely "localized" determination, not embodied in any uniform national regulation or standard promulgated by the Secretary of Transportation. The equation for improving safety at public grade crossings requires a joint effort by state regulators, the railroads, and the public. Removing the railroads, and their vast expertise and resources from this equation, as CSX would have the Court do, will seriously hamper achievement of this important safety goal and leave innocent victims, or those representing their estates, with no compensatory recourse whatsoever.

A. FRSA Section 434 and accompanying legislative history do not express a clear and manifest congressional intent to preempt state common law tort actions against railroads.

The FRSA was enacted with the stated purpose of improving safety in all areas of railroad operations to reduce injuries and deaths. 45 U.S.C. §421. Improvement of safety at public grade crossings was

an important focus of the FRSA. 45 U.S.C. §433. Although Congress sought uniformity in railroad safety regulation, Congress clearly envisioned toleration of state regulation where appropriate:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. *A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.* A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to *eliminate or reduce an essentially local safety hazard,* and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434. (Emphasis added).

With the enactment of the FRSA, Congress sought to advance railroad safety under a uniform approach *to the extent practicable.* The express language of Section 434 embodies a congressional recognition of the need for practical limitations upon total and absolute federal regulation of such an inherently dangerous industry with so pervasive a presence across the United States. This is particularly true with regard to grade crossing safety, where the dangers posed by a particular grade crossing are attributable to localized characteristics and conditions.

The Court's preemption analysis in this case must be grounded upon a narrow construction of FRSA Section 434, in light of the strong presumption against preemption of areas traditionally left to the

states' regulatory police powers. *English v. General Electric Co.*, ___ U.S. ___, ___, 110 S. Ct. 2270, 2275 (1990); *Jones v. Rath Packing Co.*, 431 U.S. 519, 525 (1977) (citations omitted). The statutory language of Section 434 does not expressly preempt state tort claims against railroads for failure to provide safe grade crossings. Indeed, FRSA Section 434 unequivocally authorizes state regulation to promote railroad safety *until* the Secretary adopts a rule or standard covering the subject matter covered by the state regulation. By this express language, Congress intended to defer preemption of state regulation *until* the Secretary has addressed the same subject matter.

The Court recently decided the case of *Cipollone v. Liggett Group, Inc*, ___ U.S. ___, ___, 112 S. Ct. 2608 (1992) which is instructive on the issue of federal preemption of state common law. In *Cipollone*, the Court was required to ascertain whether the federal Cigarette Labeling and Advertising Act, codified at 15 U.S.C. §1331, *et seq.* (FCLAA), precluded claims against cigarette manufacturers based on a number of common law theories.

In analyzing the preemption issue, the Court found it unnecessary to go beyond the express preemptive language contained in the FCLAA:

> (a) No *statement* relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No *requirement or prohibition* based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334. (Emphasis added).

The Court in *Cipollone*, as it has consistently done, noted the appropriateness of narrowly construing the FCLAA preemption language in light of the strong presumption against preemption of state regulation of health and safety. *Cipollone*, 112 S. Ct. at 2618. In refusing to preempt tort claims that did not fall squarely within the express FCLAA preemptive language, the Court framed the proper inquiry as whether the legal duty serving as the predicate of the common law claim falls within the precise preemptive language, so as to be precluded. *Cipollone*, 112 S. Ct. at 2621. The Court in *Cipollone* found preemption only of tort claims based upon state requirements regarding cigarette advertising and labeling, matters for which state regulation is *expressly precluded* under the FCLAA. 15 U.S.C. §1334.

In the case at bar, amici submit that a narrow, yet proper application of the FRSA preemption provision does not evince a clear and manifest intent to preempt state common law actions for injuries and fatalities at public grade crossings. FRSA Section 434 does not expressly preempt or preclude state tort claims against railroads for failure to provide grade crossings that are safe for public passage. Instead, the FRSA preemption provision, unlike that found in the FCLAA, contains a *broad reservation* of authority to the states *until* the federal government "covers" the particular subject matter by rule, regulation, order or standard. Congress has appropriately recognized the necessity for practical limitations upon exclusive federal safety regulation of an industry so dangerous and so widespread as the railroad industry. No federal statute, within the FRSA statutory scheme, nor any regulation, or other standard promulgated thereunder, covers the subject of a railroad's *duty*, the focus of state tort law, to install active warning devices to minimize crossing collisions.[2] Hence, the "predicate" of common law

---

2 45 U.S.C. §433 directs the Secretary to submit a study and recommendations to the President addressing the problem of elimination and protection of railroad grade crossings. Pursuant to this directive, the Secretary has

tort actions does not fall within the preemptive language found in FRSA Section 434, as required under *Cipollone* to effect federal preemption of state tort claims.

The Secretary has demonstrated an ability to adopt regulations and standards for specific areas of railroad safety, pursuant to authority granted under the FRSA. *See, e.g.* 49 C.F.R. §213 (track safety standards); 49 C.F.R. §215 (freight car safety standards); 45 U.S.C. §221 (train end marking devices); 49 C.F.R. §223 (safety glazing standards for locomotives, passenger cars and cabooses); 49 C.F.R. §229 (locomotive safety standards). Conspicuously absent is any federal regulation regarding the need for traffic control gates and flashing lights at railroad grade crossings, or any federal mechanism to provide compensation for deaths or injuries resulting from grade crossing collisions. The express language of the FRSA preemptive provision reflects a congressional belief that such matters would most effectively be addressed by state regulation due to the "localized" analysis required. 45 U.S.C. §434.

Congress' refusal to enact a national uniform regulation, addressing the need for grade crossing safety devices, is not surprising. The need for active warning devices requires a "localized" determination based upon consideration of many factors that differ greatly from crossing to crossing. The level of danger and likelihood of resulting accidents, and the corresponding duty of a railroad to exercise ordinary care, will vary depending upon factors that are unique to each grade crossing. The duty to install active warning devices is clearly best left to state courts to ascertain whether the railroad acted in a responsible manner commensurate with the circumstances presented by a particular grade crossing. The

---

established regulations governing reporting of accidents and warning signal failures at grade crossings, 49 C.F.R. §234, but, to date, no regulations addressing a railroad's duty to install active warning devices at grade crossings have been adopted by the Secretary.

continued ability of state courts to perform this analysis, and to assess liability and award damages, serves an important regulatory function not embodied in any federal regulations or standards.

Congress may have ultimately envisioned uniformity and comprehensiveness of federal regulation of railroad safety matters. That congressional intention, however, does not support the preemption of matters *not yet the subject* of federal regulation. The legislative history of the FRSA noted the magnitude of the safety problem with which Congress was attempting to grapple, and the importance of a federal-state partnership approach to improving railroad safety:

> ... For all classes of persons, including highway-grade-crossing casualties, passengers, and trespassers there were 2,299 killed and 23,356 injured in train accidents during the past year. We cannot afford the continuation of these losses....
>
> ... Grade crossing accidents rank as the major cause of fatalities in railroad operations. They account for 65 percent of the fatalities resulting from all types of railroad accidents, and rank second only to aviation mishaps in severity. Annually, about 4,000 accidents produce approximately 1,600 deaths, which is also a matter of major public concern....

H.R. Rep. No. 91-1194, 91st Cong., 2nd Sess. 11, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4106, 4126. *See, also,* H.R. Rep. No. 93-118, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Admin. News 1859, 1892-93.

The legislative history further reveals a congressional belief that state regulation, in whatever form, would serve an important complementary function to federal regulation to *avoid regulatory gaps*.

For example, Congress considered the testimony of then Secretary of Transportation, John Volpe:

> *To avoid a lapse in regulation, Federal or State,* after a Federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation or standard relating to railroad safety until the Secretary has promulgated a *specific* rule, regulation or standard covering the subject matter of the state requirement. *This prevents the mere enacting of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secreiary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect.*

Federal Railroad Safety and Hazardous Materials Control Act: Hearings before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 51 (1970) (written statement of John Volpe, Secretary of Transportation). (Emphasis added).

• The legislative history of the FRSA evinces a grave congressional concern for the staggering number of injuries and deaths resulting from grade crossing collisions. Congressional deliberations preceding enactment of the FRSA express no intention to preempt common law remedies, but rather express an intention to preserve state regulation of railroad safety matters *until* the Secretary adopts a *specific* rule, regulation, or standard covering the same subject. The Secretary has promulgated no regulation, rule or standard covering a railroad's duty to install active warning devices at grade crossings. The arguments advanced by CSX, if adopted, will create the very regulatory vacuum that Congress sought to avoid, by *sanctioning railroad inaction*, even in the face of known dangers, until state regulators

direct the Railroad to install active warning devices at a particular crossing.

While the legislative history of the FRSA considered, at some length, the interrelationship between the federal government and the states in promoting grade crossing safety, nowhere does that history express a congressional intention to preempt state tort actions and remedies against railroads. Minimal congressional debate or discussion, or mere silence, is insufficient to overcome the strong fundamental presumption against federal preemption of state law. *Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, ___, 111 S. Ct. 2476, 2483 (1991) (citation omitted).

The Railroad possesses the best information regarding dangerous conditions at grade crossings under its supervision and control. The Railroad's vast knowledge and resources are critical to effective efforts to improve public safety at public grade crossings. CSX should be made to actively utilize its resources in a responsible fashion that seeks to maximize safety for both its employees and the travelling public. Railroads must be proactive, not reactive, where lives are daily at stake.

The FRSA underwent significant amendment in 1988 with the enactment of the Rail Safety Improvement Act of 1988, codified at 45 U.S.C. §431. Congress once again declined to adopt any uniform rule or standard governing the need for active warning devices at crossing locations. Senate Report No. 100-153, 100th Congress, 2d Sess. 4, *reported in* 1988 U.S. Code Cong. & Admin. News 716-717. In fact, the legislative history addressed a host of matters largely unrelated to grade crossing safety. *Id.* at 696-698. Although Congress broadened the Secretary's authority to impose civil penalties upon individuals for federal safety violations, nowhere did Congress discuss precluding or abridging state court damage awards against negligent railroads. *Id.* at 710. Given the absence of a comparable federal tort scheme, 45 U.S.C. §434 expressly preserves state common law tort

actions and damage awards against railroads for their negligent failure to provide safe grade crossings.

It is remarkable, to say the least, to suppose that Congress intended something as significant as preemption of an entire body of state common law, and abolition of all rights and remedies afforded thereunder, without some specific mention in the statute or legislative history of a clear intention to do so. All that can be fairly gleaned from the FRSA legislative history is a sobering congressional awareness of the national scope and severity of the grade crossing safety problem, and a desire for the federal government and the states to undertake a coordinated effort to study the problem and develop solutions.

The focus of state tort law is much different than that of state regulators charged with allocating limited federal dollars for installation of warning devices at grade crossings. The purpose of tort law is to establish and impose liability for negligent acts. State tort law frequently focuses upon whether specific facts and circumstances dictate a *need* for and a duty to provide protection above that required by statute, typically crossbuck signage, at a particular crossing. Common law tort actions bear no connection with or relationship to systematic state programs that allocate federal funds for safety devices at railroad grade crossings, from which any preemptive intent may be discerned. *Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, ___, 112 S. Ct. 2031, 2037 (1992). Nor does recognition of state tort claims frustrate or conflict with important federal goals, since both common law tort actions and the federal regulatory scheme work to accomplish safer, more responsible behavior by railroads. There is simply no conflict between FRSA safety requirements, that address a host of non-related matters, and state common law, that imposes a duty of reasonable care upon railroads, from which the Court can discern a clear and manifest congressional preemptive intent. The potential for significant tort liability exposure creates dynamic incentives for railroads to actively undertake measures to provide

maximum safety at public grade crossings, consistent with the stated objectives of the FRSA.

The Railroad has failed to demonstrate a clear and manifest congressional intention, indeed, any congressional intent at all, to preempt state common law tort claims and thereby immunize railroads from liability for accidents at public grade crossings that they maintain and control. The compensatory and regulatory ends served by state common law actions have not been shown to be incompatible or inconsistent with federal regulatory aims espoused in the FRSA and its accompanying legislative history. The Court should affirm the decision below, and preserve, for state courts, the determination of whether CSX met its well-established common law duty to exercise ordinary care under the facts of the case below.

B. Federal regulations promulgated under the Federal Highway Safety Act do not address a railroad's duty to provide active warning equipment at public grade crossings and, therefore, have no preemptive effect upon tort actions that establish such a duty.

CSX also misconstrues the purpose and scope of federal highway safety regulations promulgated under the FHSA. Although the Secretary has adopted specific regulations covering many areas of railroad safety, the Secretary has not promulgated any regulations under the FRSA or the FHSA that address the Railroad's duty to install active warning devices at public grade crossings. When preemption by regulation is considered, courts should be reluctant to preempt state law absent a very clear and specific intent, since agencies normally address problems in a detailed manner. *Hillsborough County, Fla. v. Automated Med. Labs*, 471 U.S. 707, 718 (1985).

The FHSA statutory scheme contains no express preemptive provision. The stated purpose of regulations adopted under the FHSA is to advance

federal aid projects at railroad facilities. 23 C.F.R. §646.200(a). The FHSA directs the Secretary to assist the states in the development of highway safety programs that meet applicable federal regulations and enable the states to qualify for federal funding. 23 U.S.C. §§401, 402; 23 U.S.C. §130. In furtherance of this goal, the Secretary has promulgated regulations regarding sources of federal funding, types of projects, classification of projects for receipt of federal dollars, and design of grade crossing improvements. 23 C.F.R. §§646.206-646.214. These regulations largely eliminate any contribution by railroads toward the cost of installing active warning devices where federal funds are used. 23 C.F.R. §646.210(a).

Federal highway aid regulations establish the Manual on Uniform Traffic Control Devices (MUTCD) as the national standard for warning devices at public grade crossings, and require states to develop programs[3] adopting the MUTCD as a *condition* to *qualify* for federal highway aid for grade crossing safety improvements. 23 C.F.R. §655.601; 23 C.F.R. §646.214(b).[4] Nowhere, however, does this body of regulations evince any hint of a congressional intention to preempt state common law tort actions. The Secretary has, however, clearly demonstrated his ability to preempt other types of state laws, within

---

3 For example, Ohio has implemented a safety warning program that identifies public grade crossings as candidates for federally-funded safety equipment installations. Selection of those crossings where limited federal funds will be allocated is made by a diagnostic team, that includes railroad representatives, subject to approval by state regulators. Warning devices installed with federal funds comply with MUTCD requirements.

4 23 C.F.R. § 646.214(b) addresses the types of safety devices to be utilized at grade crossings that are improved with federal funds. By its own terms, this regulation applies only to *federally-funded* projects. The Cook Street grade crossing, at issue below, was not improved with federal highway aid funds.

these same regulations, where the Secretary has intended such a result:

> *State laws* requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings *shall not apply to Federal-aid projects.*

23 C.F.R. §646.210(a). (Emphasis added).

CSX asserts that the MUTCD, in particular Part VIII, vests sole responsibility for initiating and selecting crossing safety improvements in state agencies. The language of Section 8A-1 of the manual belies these assertions, as it expressly contemplates "joint responsibility in the traffic control function between the public agency and the railroad." Although the manual vests final authority in the public agency to determine and select the traffic control devices to be used, it is illogical to interpret that language as a federal directive that railroads are henceforth relieved of all duties and responsibilities to provide safe grade crossings. Such a result would clearly ignore the express language of the MUTCD directing that railroads shall play a prominent role in safe traffic control at public grade crossings. The manual provisions do not abolish or alter a railroad's longstanding common law duty to provide safe public grade crossings under its supervision and control.[5]

---

5 Reasonably, the prospect of significant tort liability should induce railroads to develop their own plans for monitoring and improving grade crossing safety, a result entirely consistent with the stated goals of the FRSA to promote safety and reduce injuries and deaths. 45 U.S.C. §421. Federal interests in promoting uniformity and comprehensive state planning are fully protected by requiring private initiatives to be reviewed and approved by the appropriate state regulatory agency before installation of crossing improvements. Requiring public approval of grade crossing safety improvements does not conflict with the common law duty imposed upon railroads to initiate steps to seek that approval in the face of known dangers.

Regulations promulgated by the Secretary under the FHSA, including the MUTCD, are largely designed to establish funding sources and criteria for states to adopt to qualify for federal highway aid for crossing safety improvements. Federal regulations adopted under the FHSA are intended to accomplish the flow of federal highway dollars to the states for qualifying grade crossing safety improvements, and not, as the Railroad argues, to preempt state tort actions. Nowhere does the MUTCD generally specify when particular safety devices are required. The MUTCD addresses types of acceptable warning devices, their design and placement at crossing locations. States' efforts to develop programs that comply with federal regulations are both laudable and understandable. It is ludicrous to suggest that states are required to relinquish vitally important police powers as a condition to participating in federally-funded programs for grade crossing safety improvements. Such a result, amici submit, is inconsistent with the law and certainly with the development of sound public and regulatory policy. Congress has not seen fit to impose such conditions upon the states, nor should the Court.

Nor are common law tort actions disruptive to the federal highway regulatory scheme. The common law focuses upon a railroad's duty and responsibility to provide grade crossings that are safe for public passage, and not upon types, design, engineering and placement of crossing safety devices which are matters addressed by the MUTCD. The distinctive and non-conflicting ends sought to be achieved by common law duties and federal regulations addressing grade crossing safety were clearly delineated in the well-reasoned decision issued by the appellate court below:

> ... 23 U.S.C.A. §130(d) (1990) ... does not explicitly or implicitly pre-empt any state laws except perhaps any laws dealing with surveying and prioritizing projects ... this section contains no explicit provisions pre-empting contrary or similar state law.

> Second, we are unable to imply pre-emption because this statute is not such a pervasive set of regulations that we could fairly imply a congressional intent to pre-empt the field ... Finally, we are unable to find any actual conflict between the state and federal law. *Allowing tort suits to go forward against railroad companies simply does not affect (or at best it only tangentially affects) the provision of federal aid to the states to help them build better railroad grade crossings.*

Easterwood v. CSX Transportation, Inc., 933 F.2d 1548 (11th Cir. 1991), *cert. granted*, 60 U.S.L.W. 386 (1992). (Emphasis added). The *Easterwood* court characterized federal highway aid statutes as creating an invitation to the states to qualify for federal aid by complying with specified federal regulations. In so noting, the court below properly found that the federal highway regulatory scheme neither expresses nor implies any congressional intention to preempt common law tort actions for failure to provide adequate warning devices at public grade crossings. Such an intent simply does not exist.

If there exists any tension between the federal railroad safety regulatory scheme and the availability of state common law tort claims in the instant case, and amici submit that the two coexist harmoniously, it is a tension that Congress has expressed its willingness to tolerate. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

CONCLUSION

The Eleventh Circuit Court of Appeals properly held that federal statutes and regulations do not preempt state tort actions against railroads for their negligent failure to provide safe public grade crossings. The Court should hold that the FRSA and FHSA, and regulations promulgated thereunder, do not preempt state common law tort remedies against railroads for failure to provide adequate warning protection at public grade crossings.

Respectfully
submitted,

LEE FISHER
Attorney General
State of Ohio

NANCY J. MILLER
Deputy Chief Counsel
Ohio Attorney
General's Office
30 East Broad Street,
17th Floor
Columbus, OH 43215
(614) 466-5026